No. 4535

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United States
Circuit Court of Appeals
For the Ninth Circuit

RALPH FILCHER, ALBERT B. SCHMIDT and CHARLES F. JONES,

Appellants,

vs.

UNITED STATES OF AMERICA, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; FLORENCE MINING COMPANY, a Corporation, and JOSEPH KUNTZ, Jr.,

Appellees.

Brief of Appellants

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STATEMENT OF THE CASE.

This is an action brought by the United States against the Northern Pacific Railway Company and its lessees to cancel a patent to portions of section 9, township 1 south, range 4 west, Madison County, Montana, upon the grounds (1) of fraud on the part of the defendant railway company in accompanying its application for patent with a non-mineral affidavit when the land applied for was notoriously and obviously mineral in character, and (2) mistake and inad-

vertence on the part of the plaintiff's agents and officers in classifying said land as non-mineral, and in granting the defendant railway company a patent therefor. The allegations of fraud and of mistake and inadvertence are denied by the defendants.

After the cause was at issue as between plaintiff and defendants, by consent of all parties and by order of court (Tr. 37, 55), Ralph Filcher, Albert B. Schmidt and Charles F. Jones were permitted to intervene. Their petitions in intervention are practically identical in essential allegations, and show that the intervenors are the locators and claimants of certain mining claims within the ground in controversy and antedating the patent. Jones is the claimant of the Granite Spar claim, located in 1904 (Tr. 18), and Filcher the locator, and Filcher and Schmidt the present claimants, of the Never Pay Lode (Tr. 21). These petitions stress the mistakes made by officers of the government in classifying the land, in identifying the tract classified, in failing to give the notice required by law to adverse claimants, and in issuing a patent upon land thus erroneously and illegally classified. They allege that the land was described and classified as "section 9," and that the subsequent notice of such classification described the land in the same way, before the survey thereof and when there was in reality no such section, and that such notice did not comply with the law prescribing the classification and publication of such notice. The notice as published is set forth verbatim in said petitions.

The answers of defendants to the petitions in inter-

vention admit that the land was classified as section 9 before the survey thereof, and that the notice set forth in the petitions was published as alleged, but deny other affirmative allegations of the petitions (Tr. 50, 70).

The findings of the court were in favor of the defendants, and the decree entered thereon dismissed the action with costs to defendants.

The facts adduced at the trial showed that the area covered by Filcher's Never Pay Lode was first located in 1895 by one J. B. Anthony and another as the Bay Horse Lode claim. Anthony represented this claim for many years (Tr. 153), but in 1908 Anthony killed a neighbor, one Moraw (Tr. 147), and was sent to the penitentiary. His claim was not represented in 1909 (Tr. 158, 128), and thereafter, on January 1, 1910, Filcher relocated it as the Never Pay Lode claim (Tr. 124, 21).

During the year 1904, M. L. Hewitt, operating a smelter at Basin, Montana, and needing iron ore for flux, opened up the Bay Horse deposit (Tr. 134). The ore was hematite and suitable for his purpose (Tr. 112). Whether or not this work was done with Anthony's consent was not clearly shown in the testimony. There was an intimation that it was done in hostility to Anthony's claim (Tr. 137). At any rate, some 1,500 tons of ore were shipped from an open cut on the Bay Horse, which witnesses called the glory hole (Tr. 135). Hewitt testified that this deposit was chosen because of its carrying gold and silver, estimated to run from $3.00 to $12.00 per ton

(Tr. 135). Arthur Loiselle and Henry Loiselle, who worked for Hewitt on the claim, also testified that the ore contained lead, copper, gold and silver (Tr. 136, 139), that the glory hole was round in shape, 30 to 40 feet across, and about 18 feet deep (Tr. 136). Arthur Loiselle and Mr. Moraw located a new claim, adjoining the Bay Horse, containing silver ore (Tr. 147, 160), and performed annual labor thereon for two years (Tr. 137). Loiselle then surrendered his interest to Moraw, who held it until the time of his death, going into debt $300.00 or $400.00 for that purpose (Tr. 160). After his death his widow and her sons continued to represent the claim until the land was patented to the railroad company (Tr. 147).

It is admitted that the area in controversy was first classified as mineral by Watson Boyle, a mineral land commissioner, under the Classification Act of February 26, 1895, and a report of such classification was filed in the United States Land Office at Helena, Montana, that the notice of such classification was published thereafter, beginning July 9, 1902, at least once a week for four consecutive weeks in the Madison Monitor, a newspaper of general circulation, published in the County of Madison, and concurrently in the Helena Evening Herald, a similar newspaper published at Helena, the capital of the state. No protest of any kind was filed by any person at any time against this mineral classification (Tr. 6, 28), but the classification so made was not approved by the Secretary of the Interior. The reason for his failure to approve the same did not appear in the evidence. The de-

fendants allege that proof of the publication of the notice of the Boyle classification was not made or filed as required by the regulations of the Secretary of the Interior (Tr. 28), but offered no proof in support of this allegation.

The evidence shows that the classification of this tract and of many others was held in abeyance for many years without action *pro* or *con* by the Secretary of the Interior. His letter of instructions of November 21, 1911, (Tr. 108-110) refers to a list of lands classified but unapproved, which probably contained the land in controversy. This letter, without disapproving any of such classifications, calls for certain further proofs relating to the sufficiency of the publication of the notice of classified tracts and further reports as to the character of the lands. While this letter of instructions only directs an examination of the various tracts, it is the document on which the defendant railroad company relies to show authority for both the examination and the classification made by Mineral Examiner Lindsay.

Lindsay made his examination of the land July 7-10, 1913, as shown by his report to the commissioner of the General Land Office (Tr. 111). He reports that the areas to be examined were located with much difficulty owing to the fact that only a small portion of the western border of the township had been surveyed. He does not claim to have tied to this survey. He resorted to the assistance of the officers of the Forest Reserve and their maps in making locations that he deemed "fairly accurate."

The township in which the land in controversy is situated immediately adjoins the base line of the public surveys for Montana. As is well known, townships decrease in width toward the north, due to the convergence of meridians. If corrections were not occasionally made and townships again given their full width of 6 miles, they would become excessively narrow. These corrections are made on the base line. The townships and sections north of the base are full size, while those south of the base are narrower, depending in amount of shortage on their distance from the last correction line, also somewhat on the accuracy of the survey. It follows that corners marking sections north of the base line furnish no criterion for locating section lines south of the base. If Lindsay attempted to do this in locating the boundaries of Sec. 9 (to be) and underestimated the amount of the correction, he would locate the section further west than it should have been. The evidence shows that there was a correction of between 1,600 and 1,900 feet between the section lines north and those south of the base (Tr. 122, 150), and that it was practically impossible for a man, not a surveyor, to have located the boundaries of the future section 9 at the time Lindsay made his classification (Tr. 122, 123, 150). Theoretically, it would have been possible for Lindsay, by completing the survey of the township, to have located the sections therein classified with approximate accuracy. He does not say that he did this, and the inference is that he did not do it. Mineral Examiner Holly testified that he knew Lindsay would not have

done it because of a steep mountain intervening between section 9 and the surveyed portion of the township (Tr. 151).

But there is positive proof in Lindsay's own report that he did not locate the section 9 that was to be. He says (Tr. 112):

> "Section 9 is located in the Madison National Forest Reserve in the north slope of the mountain. There is an iron dike extending through a part of this section, which has been worked to a limited extent, on the adjoining section to the east. The work consists of open cuts, the character of the ore is hematite. I was informed that some shipments were made, the same being used for fluxing."

At the time of this report almost ten years had elapsed since Hewitt had shipped his 1,500 tons of flux (Tr. 135). It was shown and not controverted that there was only one cut from which fluxing ore had been shipped in that vicinity that could answer to this reference in Lindsay's report, and that was the glory hole on the Never Pay. It was further shown (and uncontroverted) that on the "section to the east" (Sec. 10) there was no place from which ore had ever been shipped for flux, and there was not even a wagon road into the section upon which ore could have been hauled. Even at the time of the trial, there were only two or three recent little prospect holes on section 10 (Tr. 121, 129, 152).

Lindsay described the land which he classified merely as "section 9," giving township and range. The land was surveyed the following year (Plaintiffs' Ex. 20,

Tr. 150), and the plat of the survey filed and approved March 25, 1915 (Tr. 134).

Filcher's discovery shaft made in 1910 was 4x7 feet horizontally and 10 feet deep, and was situated 60 or 70 feet south of the Glory Hole (Tr. 124). His evidence shows that he put up the notices, marked the claim on the ground and recorded the certificate of location in the manner required by law. He maintained the posts marking the boundaries of his claim, replacing such as were rubbed down by range stock (Tr. 125). He obtained assays of gold and lead from his claim. At the time of his location the lead was exposed in the Glory Hole and he secured therein samples carrying gold, lead and silver. "Some of them were favorable and others not" (Tr. 126).

B. C. Leyson, an assayer, miner and mine operator of 50 to 55 years' experience in nearly all the western states (Tr. 140), took a sample from the Filcher discovery shaft that assayed $16.40 in gold (Tr. 142). From the Glory Hole he took five samples, four of them assaying from .5 to 2.1 per cent in lead, and one assaying $9.60 in gold. Leyson had visited the mine in 1904, when it was claimed by Anthony, and took a sample which he assayed, obtaining $4.60 per ton in gold (Tr. 140).

Mineral Examiner Galbraith took a sample from the vein in the bottom of the Filcher discovery shaft that assayed .54 of an ounce in gold (Tr. 120). Witness John Reed examined the Never Pay at numerous times in 1913 or 1914. From a general sample he obtained an assay of 1.5 per cent lead and $1.25 in gold (Tr.

145). At the time of the trial the defendants had discovered the ore in the Filcher discovery shaft by stoping it from below (Tr. 123).

The Granite Spar location of intervener Jones has not been developed to the same extent as the Never Pay claim. The ore is a hematite and some had been shipped for flux (Tr. 130). Jones had discovered by assays that the ore contained gold and silver. He obtained assays as high as $7.20 in gold, and 1.4 ounces in silver (Tr. 131). Jones worked on his claim every year after purchasing it (Tr. 159). He bought the claim of Mr. Cheney, and paid him for it (Tr. 132), although Cheney, testifying for the defendants, claimed that Jones was to pay if he got anything out of it (Tr. 157). From this testimony the trial court found that the claim had been a gift (Tr. 80).

Several witnesses testified to the "iron capping" disclosed in the Glory Hole as being a favorable indication for the development of other ores, such as gold, silver and lead (Tr. 122, 126, 132, 138, 143-144, 146). Numerous witnesses testified that at all times the mineral showings on the Never Pay and Granite Spar locations were sufficient to justify a prudent man in expending his time and money in the development of the claims in the expectation of finding ore of commercial value therein (Tr. 121, 137, 139, 143, 146).

It is admitted that the notice of the Lindsay classification was published as alleged in the petitions in intervention in which the land in controversy was described as "section 9" and not otherwise. The Lindsay classification was approved by J. E. Lantz, chief

of Field Division (Tr. 113), and thereafter, on October 12, 1915, the said section 9 was included in selection list No. 454 of the defendant railway company, to which list was attached the affidavit of J. M. Hughes that the "said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant," etc. Thereafter, on June 16, 1916, the patent in controversy was issued to the Northern Pacific Railway Company (Tr. 116). The only disapproval of the Watson Boyle classification, by the Secretary of the Interior, was that which might be inferred from the subsequent approval by him of the Lindsay classification.

N. H. McDonald, a mining engineer in the employ of the defendant railway company, examined the property in 1919. There was considerable snow in the Glory Hole, but there was a clear exposure on the west side, of 16 to 18 feet from the surface down (Tr. 169 Cf. 136). He claimed to have found no evidence of mineral other than iron but admitted having suggested to the defendants' land commissioner the possibility of striking other minerals (Tr. 168). But the lease thereafter given to Raiff (assignor of defendant Florence Mining Co.), at a time when the only development work done on the ground was that which had been done by Anthony, Hewitt and Filcher, definitely states that:

> "The ore contains gold and silver which shall be paid for when found in the ore in quantities for which smelting companies make payments in

> accordance with their usual practices. In order that the lessor may receive royalties on the full value of all ores, the lessee agrees that all his sales of ore shall be conditioned upon the agreement by the purchaser to ascertain by analyses, or in some other manner satisfactory to the lessor, the gold and silver content of such ore, and to save and pay for the same when found in quantities customarily paid for" (Tr. 155).

It is uncontroverted that Filcher represented the Never Pay in 1911 and 1912 (Tr. 124, Cf. 158). While admitting this work, Filcher's divorced wife, formerly Mrs. Moraw, now Mrs. Brijkvok, attempted to throw doubt on his work for 1914 and 1915, although admitting part work in 1913 (Tr. 158). However, the defendants' own evidence shows that the claim was represented in 1912 (Tr. 158), and hence that it was a valid and subsisting claim in the summer of 1913, when Lindsay made his purported classification. Furthermore, as to subsequent years until patent issued there is absolutely no evidence of abandonment by Filcher, or any evidence of a forfeiture through relocation by any other person.

SPECIFICATION OF ERRORS RELIED UPON.

1. The court erred in holding valid the notice of classification of the land in controversy as non-mineral by Mineral Land Examiner Lindsay, as published during the months of January and February, 1914, in the Madisonian and Helena Independent, since the evidence is uncontroverted that the said land was

described in said notice as surveyed land when in truth the same was admittedly unsurveyed, and said notice therein violated the plain requirements of law.

2. The court erred in sustaining the classification of said land as non-mineral and the patent based thereon when the uncontroverted report of the mineral land examiner who classified said land as non-mineral did not identify the true boundaries of said section 9 and considered the Never Pay location upon another and adjoining section.

3. The court erred in not holding that the mistake made by Mineral Land Examiner Lindsay in not identifying the true boundaries of said section 9 vitiated the classification made by him and also the patent based upon said classification.

4. The court erred in not holding that the notice by publication of the Lindsay Classification did not comply with the requirements of the Act of February 26, 1895, providing for the classification of the land in controversy and the amendments thereof, or with the instructions of the Land Department and did not constitute notice to any of the intervenors herein.

5. The court erred in not finding the land in controversy to have been known mineral land on June 16, 1916, when the patent therefor was issued to defendant railway company, and that the same at said time was valuable, and known to the public generally to be valuable, for minerals other than iron and coal, and that

the said defendant acquired no title thereto by virtue of such patent.

6. The court erred in not holding that the non-mineral affidavit by J. M. Hughes, as the Land Agent of the defendant railway company was false and fraudulent as against the United States.

7. The court erred in not holding the original Watson Boyle classification of the land in controversy to have been still effective when the patent in question was issued to the defendant railway company, and hence that said patent was void under the provisions of said Act of February 26, 1895, and especially under the provisions of section 7 thereof.

8. The court erred in not finding that the patent in controversy was issued through mistake and inadvertence and to the detriment of the just rights of the intervenors.

9. The court erred in not finding that intervenors had no notice of the non-mineral classification of the land in controversy, that they were aggrieved thereby, and that they had no opportunity to defend their rights in said land or to contest said classification before the issuance of said patent.

10. The court erred in sustaining the validity of the patent to the lands in controversy in this action.

11. The court erred in entering a decree in favor of the defendants and against the plaintiff and these intervenors, and in dismissing the bill of complaint.

ARGUMENT

This case involves the proper interpretation of the Act of Congress of February 28, 1895, hereinafter referred to as the "Classification Act", an interpretation which has never as yet been made by any appellate court.

The grant of land to the Northern Pacific Railroad Company, made by Congress in 1864, contained the following condition *inter alia*: "That all mineral lands be, and the same are hereby, excluded from the operations of this Act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands * * * may be selected, * * * and that the word 'mineral' when it occurs in this Act shall not be held to include iron or coal."

Soon after the definite location of the road, controversies began to arise between the railroad company and locators of mining claims on odd-numbered sections within the limits of the grant, the railroad company claiming that its right attached to all tracts not known to be mineral on the date of the definite location of the road, the mineral claimants maintaining that its right could not attach to mineral lands.

This controversy was decided in 1894 by the Supreme Court in the case of Barden v. Northern Pacific R. Co., 154 U. S. 288, adversely to the contention of the railroad company. Judge Field in his decision says: "Mineral lands are not conveyed, but by the grant itself and the subsequent resolution of Congress cited were specially reserved to the United States and ex-

cepted from the operations of the grant. Therefore, they were not to be located at all and if in fact located they could not pass under the grant. * * * It is difficult to perceive the principle upon which the term 'known' is sought to be inserted in the Act of Congress either to limit the extent of its grant or the extent of its mineral, though its purpose is apparent. It is to add to the convenience of the grantee and enhance the value of its grant."

Id. p. 316.

The Supreme Court was virtually asked the question, "When does the title to lands conveyed to the Northern Pacific under its grant become indefeasible as against the discovery of mineral therein?" The answer of the Supreme Court in effect was, "Never."

This decision created an infirmity in all titles passing to the railroad company under its grant, for no purchaser could be sure that some mineral discovery might not be made on the land purchased that would invalidate his title. It was like the "known lode" reservation in placer patents that has created such havoc in placer titles in some mining districts.

There were three parties interested in the Barden case, the United States, the Northern Pacific Railroad Company, and the mine claimant. The classification act of February 26, 1895, was chiefly in the interest of the Northern Pacific Railroad Company, since it provided for an indefeasible title in the company to such lands as might be classified thereunder as non-mineral, but it also protected the interests of the United

States, and of prospectors who might be developing or claiming mining locations upon the lands to be classified.

The act created a special tribunal to examine and classify all odd-numbered sections within the place and indemnity limits of the grant in certain land districts of Montana and Idaho, including the Helena district. It provided for a board of mineral land commissioners who were to examine each forty acre tract, and under certain rules classify it as mineral or non-mineral. Surveyed lands were to be described by legal subdivisions and unsurveyed lands "by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the commissioners may determine." (Section 3). The commissioners were first required to act in conjunction as a board, but the law was later so amended that they could act separately in making classifications.

The commissioners were required to file duplicate monthly reports in the local land offices of the classifications made by them, and the Register and Receiver were charged with the duty of filing in their own office one copy and forwarding the other direct to the Secretary of the Interior. The Register was further required to publish a notice of each such classification in two newspapers of general circulation, one published in the county where the land classified was situated, the other at the state capital (Sec. 5). A period 60 days after the first publication was allowed "any person, corporation or company, feeling aggrieved by such classification," to file a verified

protest against it, and upon the issues thus joined a hearing and adjudication was to be had (Sec. 5).

That Congress deemed the provisions of this law mandatory and exclusive is shown by section 7, which decrees that no patent shall be issued to the Northern Pacific Railroad Company until the land shall have been examined and classified as non-mineral, "as provided for in this act," and "any patent, certificate or record of selection, or other evidence of title or right to possession of any land in said land districts, issued, entered, or delivered to said Northern Pacific Railroad Co. in violation of the provisions of this act shall be void."

This imposes upon courts a definite rule for the determination of the validity of any patent to the Northern Pacific Railroad Company, or to its successor, Northern Pacific Railway Company, respondent herein. This rule supersedes all rules theretofore laid down in other cases, either by statutes or by decisions of courts, for determining the validity of patents.

It remains for this court to determine whether the patent in question was issued to the Northern Pacific Railway Co. in violation of any essential provision of the Classification Act of February 26, 1895.

Any segregation of the questions involved in this appeal must be more or less artificial since they are quite interwoven. The following divisions indicate the appellants' conception of these questions in the order of their importance.

I.

INVALIDITY OF LINDSAY CLASSIFICATION.

The evidence shows conclusively that Mineral Land Examiner Lindsay classified a tract which he described as "section 9" when there was no such section, when the land classified was unsurveyed, and when the Classification Act required that such lands should be described "by such natural or artificial boundaries to identify them as the commissioners may determine." That Lindsay's description was insufficient to identify the tract is shown affirmatively on the face of Lindsay's report in that the Never Pay Glory Hole, which the subsequent survey of section 9 showed to be upon that section, is referred to by Lindsay and by him stated to be upon "the adjoining section to the east" (Sec. 10).

From these undisputed facts it follows that the Lindsay classification was illegal (1) in that it described unsurveyed land by legal subdivision, contrary to the requirement of the law, and (2) in that the description was such as did not and could not identify the tract classified. Furthermore, the Lindsay report shows affirmatively that the area occupied by the Never Pay location was not included in his classification. He says that it was then "open for relocation," which is a distinct recognition on his part of its mineral character.

From these facts there is no alternative for the court to do otherwise than to hold that section 9 has never been "examined and classified as non-mineral, as pro-

vided for in this (classification) act," that the area covered by the Never Pay location Lindsay did not even purport to classify, and that the patent issued for said section to defendant railway company has been issued in violation of the provisions of the Classification Act, and is void.

The foregoing ought to be conclusive of this case, but the trial court somewhat summarily put out of consideration the Lindsay report on the ground that Lindsay had not been produced to explain it. The court says:

> "But for some inscrutable reason plaintiffs neither produced the examiner nor accounted for his absence. To this attaches a presumption adverse to plaintiffs" (Tr. 77).

The court probably intended to include intervenors in the term "plaintiffs." Why it was impossible to have called Lindsay was impliedly shown in a question that defendant's counsel asked of Witness Holly:

> "Did you know Mr. Lindsay during his lifetime?" (Tr. 151).

Counsel for defendants knew that Lindsay was dead. They did not ask that he be produced to explain his report, or object to its introduction on that ground. The only ground of their objection was that "the classification is the findings and judgment of a special tribunal and conclusive upon the court" (Tr. 157).

Section 891 of the Revised Statutes provides that.

> "Copies of any records, books or papers in the General Land Office, authenticated by the seal and certified by the commissioner thereof * * * shall be evidence equally with the originals thereof."

"As the records of this office (land office) are of great importance to the country," says the Supreme Court in Galt v. Galloway, 4 Pet. 331, "and are kept under the official sanctions of the government, their contents must always be considered, and they are always received in courts of justice as evidence of the facts stated."

Howard v. Perrin, 200 U. S. 71;
Culver v. Uthe, 133 U. S. 655;
Hanrick v. Barton, 16 Wall. 166.

The Lindsay report (Plaintiff's Ex. No. 5, Tr. 111), and not the register's published notice of that report, is the classification itself. It is the document on which the subsequent proceedings resulting in the patent in question were based. It is the best if not the only evidence of that classification. If Lindsay had been living, there was no necessity for plaintiffs to call him. There was no ambiguity or uncertainty in his report. It is a well established rule that any official proceeding that is evidenced by a document or series of documents cannot be altered by parol testimony. From the standpoint of intervenors and of plaintiff, there was no occasion to produce Lindsay or to account for his absence. If he had been living and in court at the trial, he would not have been per-

mitted to impeach his report or vary it by oral explanations.

22 Corpus Juris 1070.

The learned judge who tried this cause in the District Court was clearly in error in holding the plaintiffs derelict in not producing Lindsay. The question was not raised at the trial, otherwise the impossibility of producing him could have been readily shown. But this erroneous opinion entertained by the trial judge evidently caused him to regard the evidence of mistake and illegality in the Lindsay report as of little weight (Tr. 77-79).

II.

THE INVALIDITY OF THE LINDSAY NOTICE.

The Classification Act recognized the necessity of protecting the rights of the third party in interest—the mine claimant. The mining laws of the United States permit the prospector who discovers a lode or deposit of ore in place containing any of the metals named in the statute, to distinctly mark the boundaries of his claim so that they can be readily traced, and to take possession of the ground located. He is not required to make any record thereof in the local land office, and the officials of the Interior Department may not, and usually do not, have any notice or knowledge of the existence of such claim until the claimant applies for a patent.

And yet the title acquired by such a location is

property in the highest sense of the word, and may be sold, transferred, mortgaged and inherited without infringing the title of the United States. Such a location has the effect of a grant by the United States of present and exclusive possession.

Forbes v. Gracey, 94 U. S. 762;
Belk v. Meagher, 104 U. S. 279;
Gwillim v. Donnellan, 115 U. S. 45;
Noyes v. Mantle, 127 U. S. 348;
Manuel v. Wulf, 152 U. S. 505.

Rights acquired in this way on the public lands of the United States could not be ignored in making the classifications provided for by the act of February 26, 1895. Accordingly, careful provision was made for the publication of each and every classification, and opportunity given for any person, corporation or company, feeling aggrieved by the classification of any tract, to file their verified protest and have the issue tried as other judicial proceedings in the Land Department.

The publication of this notice was for the evident purpose of securing jurisdiction of all parties beneficially interested in the lands classified. It was equivalent to the publication of a summons in a court at law, and the same rules as to its sufficiency should be applied as is applied in other tribunals where jurisdiction must be obtained by publication.

Notice by publication is a mighty poor substitute for personal notice, but it is one of the makeshifts to which the law has been compelled to resort in certain cases. Since it is purely a creature of law, however,

the law must be strictly observed, otherwise the court gains no jurisdiction.

32 Cyc. 467;
Cheely v. Clayton, 110 U. S. 701;
Galpin v. Page, 18 Wall. 350;
Settlemier v. Sullivan, 97 U. S. 444;
Gage v. Riverside Trust Co., 156 Fed. 1002;
Cohen v. Portland Lodge, 152 Fed. 357;
Batt v. Proctor, 45 Fed. 515;
Hartley v. Boynton, 17 Fed. 873;
Bracken v. Union Pac. Ry. Co., 56 Fed. 477.

Nowhere has this rule been more completely adopted than in the Land Department. In the case of Parker v. Castle, 4 L. D. 84, Secretary of the Interior Lamar said:

> "It is a principle as old as the common law itself, that where personal or property rights are involved in a judicial inquiry, jurisdiction cannot be acquired until due notice thereof, by personal service, is given to the party or parties interested. In the progress of events, exception has been made to this general rule where property rights are involved. But the exception exists only by virtue of statutory enactments, and being in derogation of the common law right of personal service, it is universally held that it must be affirmatively shown that the statutory requirements have all been complied with, as a condition precedent to the acquiring of jurisdiction through the substitute service."

When the published notice of the Lindsay classification is examined (Tr. 48), it will be seen that it wholly fails to comply with the essential requirements of the classification act. The Land Department thereby acquired no jurisdiction of intervenors. By the

terms of the law, unsurveyed tracts should be described in the notice by metes and bounds. The Lindsay notice described unsurveyed land as if it had been surveyed.

The law required an unsurveyed tract to be described in a manner sufficient to identify it. The Lindsay notice contained a description impossible of identification, an impossibility which is forcibly shown by Lindsay's own failure to identify it.

The description "section 9" in said notice was no more calculated to put Filcher or Jones on inquiry than "section 17" in the same township. If Filcher had by any chance discovered the fact that Lindsay was attempting to classify a section not yet surveyed that might include his claim, and had gone to the Helena Land Office to investigate, he would have been lulled into inaction by the Lindsay report itself, clearly showing the tract classified did not include the Never Pay claim.

It would be impossible to conceive a substituted service of process more absurdly insufficient than this published notice of the Lindsay classification. It was void, and that invalidity vitiated every official act based thereon, including the patent itself. The patent was clearly issued in violation of the provisions of the Classification Act.

III.

SECRETARY'S APPROVAL NOT CURATIVE.

But counsel contended in the lower court, and will doubtless contend here, that the approval of the Sec-

retary of the Interior cured all preceding defects, that it is a finality behind which the court cannot go, that the secretary had power to have the land classified in any manner he saw fit under section 6 of the Classification Act, that the classification was made, not by Lindsay, but by the secretary, that assuming that Lindsay did make a mistake in identifying the land in controversy, such mistakes are not grounds for relief under the Classification Act, that the purpose of said act was to set at rest all questions of mineral character after a determination under the act, and that the approval of the secretary was final except on the one ground of fraud.

We cannot agree with counsel's contention that the approval of the Lindsay classification has concluded this whole matter. Section 7 of the Classification Act provides that patents issued in violation of the provisions of the act shall be void. Can the secretary cloak such violations by his approval and thereby preclude the court from making inquiry as to their existence? The law assumes the possibility of the existence of a void patent under the provisions of section 7. Who shall determine the question of its invalidity if not the court? The Secretary of the Interior could not do so.

Bicknell v. Comstock, 113 U. S. 149;
U. S. v. Schurz, 103 U. S. 378;
Moore v. Robbins, 96 U. S. 530;
Kirwan v. Murphy, 83 Fed. 275.

The provisions of the Classification Act as to the methods of describing lands classified and publishing

notice to interested persons were as binding on the secretary as on any other person. He had no power by this or any other statute to approve mistakes, omissions or fraud whereby the rights of mining claimants were cut off without the opportunity to be heard provided by the act. If he has done so in this instance and patent has issued as the result of his approval, then such approval is ineffectual, and the patent based thereon is void as having been issued in violation of the provisions of the Classification Act.

Neither can we agree with counsel that under the provisions of said act the secretary could classify land in any manner he saw fit. If he could do so, then it was within his power to wholly nullify the law. There were certain new rights guaranteed by this law that the secretary could not abrogate. One of the most important was the provision for notice to adverse claimants whereby they were secured their "day in court." The intervenors have not had their day in court. The Secretary of the Interior never had jurisdiction ever them to pass upon their rights.

The claim that the classification was made, not by Lindsay, but by the secretary, ought not to require notice, also the contention that the mistakes alleged by plaintiff and intervenors are not a ground for relief under the Classification Act.

It is true that the purpose of the act was to set at rest all questions as to the mineral or non-mineral character of the land, but to set such questions "at rest" they must have been determined in accordance with, and not in violation of, the provisions of the act.

IV.

THE WATSON BOYLE CLASSIFICATION.

The foregoing divisions of this brief contain the points that should be conclusive of this case. But counsel for defendants will doubtless quote and rely on the wording of section 6 of the Classification Act, and the court will probably find it necessary to interpret that section. We desire to consider this section in connection with the Watson Boyle classification.

The part of section 6 important in this hearing provides:

> "That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud * * *. All lands so classified as above without protest, and the classification whereof is disapproved by the Secretary of the Interior, and all lands whereof the classification has been invalidated for fraud, shall be subject to hearing and determination in such manner as the Secretary of the Interior may prescribe. And as to all such lands * * * the final ruling made after the day set for hearing shall determine the proper classification."

It is doubtless on the wording of this section that counsel contend that the Secretary of the Interior could clasify the land in any way that he sees fit, but the section does not justify that interpretation. The last sentence quoted, whatever else it may mean, clearly indicates that when the secretary resorts to any other method of classification than the primary

method provided, there must still be a "day set for hearing." This confirms the contention of intervenors that a valid classification can only follow and be based upon valid notice to mine claimants with an opportunity for their day in court.

If counsel for defendants think to rely on a literal interpretation of section 6, the intervenors have something to say on that score. The Classification Act took away from the Land Department not only the duty but the authority to classify certain lands. That authority was bestowed upon commissioners appointed by the President of the United States (Secs. 1, 2). These commissioners constituted an independent tribunal for that specific purpose. They were quite as independent of the Secretary of the Interior as of any other judicial officers.

The judgments (classifications) of these commissioners, if not protested, were submitted to the Secretary of the Interior for approval or disapproval, very much as verdicts of juries are submitted to the presiding judge. A judge may approve a verdict or set it aside, but he cannot ignore it. The secretary was not compelled to approve an unprotested classification, but the law required him to either approve or disapprove. There was no third alternative. He could not hold a classification in abeyance while he made another in some other way. Doubtless he could investigate any pending classification in any way he might see fit, but the law clearly contemplates that the first classification must be disapproved before he resorts to any other method of classification. His disapproval is as much

a formal act as his approval. It is such disapproval that vests in him the jurisdiction to classify in such manner as he might prescribe (Sec. 6).

In this case, the Boyle classification of the land was duly filed April 4, 1901, and duly published in a county and a state capital newspaper as required by law. There is no reason apparent in the record or known to intervenors why this classification should have been held up. It was neither approved nor disapproved. It was held in abeyance—apparently pidgeon-holed—for nearly ten years. It finally came up for action with a large number of other tracts similarly situated.

It may be admitted that the letter of instructions of the Secretary of the Interior to the Commissioner of the Land Office, dated November 21, 1911 (confirmed by letter of February 28, 1913), upon which defendants rely (Tr. 29, 35, 52) was the source of authority for the second (Lindsay) classification, and it was the only one. These and other similar letters and circulars bearing upon this case, if such there may be, the court has the right to take judicial notice of (Caha v. U. S., 152 U. S. 211). The essential parts of the letter of November 21, 1911, will be found in the transcript (Tr. 108).

This letter cannot be construed into a disapproval of the Boyle or any other classification. It calls attention under three heads or paragraphs (Tr. 109) to certain defects in the classifications referred to, such as describing land as the "unpatented part of Sec. .....," and deficiencies in either the publication of notices or in the required proof of such publication. The Boyle classification does not fall under anyone of these three

heads. There is no evidence of defective publication or proof, it was not defectively described, and being a mineral classification, there was of course no conflicting mining claims to be considered.

After instructing as to these three classes of defective cases, the secretary goes on to say:

> "Lands described in accordance with the instructions contained in the foregoing three paragraphs must be examined in the field and full and specific reports as to the character and condition of the lands submitted to your office. Upon receipt of such reports you will submit same with the lists and your recommendation to the department for appropriate action."

Even if the Boyle classification had been included in any one of the three classes specified, yet the letter is not in terms or intent a disapproval of the Boyle or any other classification. It is merely a call for further reports and recommendations. While the Boyle classification stood, the secretary had no power to order another one, and his letter of November 21, 1911, shows that he did not do so.

VI.

THE ISSUE OF FRAUD.

It would be quite unreasonable to contend that J. M. Hughes, the eastern land agent of the defendant railway company knowingly and wilfully committed perjury in support of the application by which said defendant acquired patent to the land in controversy. It is not necessary to make such contention. The affidavit is nevertheless false, and so far as intervenors' rights are

concerned, its effects are just as disastrous as if the affiant had been aware of its falsity. The land in controversy was not vacant, nor unappropriated. It was interdicted mineral and reserved by intervenors' mining locations. It was not of the character contemplated by the grant. In all these respects the affidavit was false.

It is too well established for argument that a patent may be set aside for fraud, mistake or imposition in its procurement.

> Duluth v. Iron Range R. Co., 173 U. S. 587;
> 32 Cyc. 1052;
> U. S. v. Cent. Pac. R. Co., 84 Fed. 218.

This non-mineral affidavit was made more than two years after Lindsay's classification. During the intervening time, the land had been surveyed and the boundaries of section 9 established, clearly showing to anyone who might investigate the error in identification. It was the duty of the defendant railway company to make its own investigation. During that two years and more, it had the last clear chance to discover and correct the error made by Lindsay.

It did not do so. There is no evidence that it attempted to do so. The examination made by its geologist was made after the issuance of the patent (Tr. 167). The affidavit made by Hughes was probably made perfunctorily, in reliance entirely on the Lindsay classification and without any attempt to verify it. If the rules of the Land Department did not require it, it is difficult to see why it was made. But it seems to have been required by the circular instructions of Nov. 7,

1879 (Tr. 171). These instructions require selection lists to be verified by the land agent of the applicant showing, among other things, that the lands are (1) vacant, (2) unappropriated, (3) not interdicted mineral, (4) not reserved, and (5) of the character contemplated by the grant.

The defendants have failed to show that the requirement for this verification has ever been abrogated. Section 2 of the instructions of July 9, 1894, requiring the land agent to attach an affidavit to the list setting forth that he has caused the lands listed to be carefully examined by agents of the company as to their mineral or agricultural character and that according to his best knowledge and belief none of them are mineral (19 L. D. 21), seems to have been dispensed with after the passage of the Classification Act (Tr. 174). But the latter affidavit is of much more limited scope than the former one. There is no evidence whatever that the requirement for the verification attached to the selection list in question (Tr. 24) was ever dispensed with, and the court was in error in so holding.

The same court committed a similar error in the case of U. S. v. Morehead, which was reversed on appeal to the Supreme Court.

243 U. S. 607.

VII.

THE NAME "NEVER PAY."

The court seems to have been influenced adversely to intervenors by the name Filcher gave his claim—"Never Pay" (Tr. 81), though why this should have

prejudiced Intervenor Jones or the complainant does not appear. If intervenors had attempted to show his motive in thus naming it, the evidence would probably have been excluded as immaterial. A mine should not be judged by the name its locator gives it. It is quite as likely to be a name that depreciates its worth as one that boasts of it. The greatest mine in Montana was named after a snake. The "Never Sweat" mine in Butte has caused many thousands to sweat in its development.

Furthermore, the name "Never Pay" could not have referred to any experiences of Filcher's himself. It rather referred to the experiences of those who had been trying to make it pay as an *iron* mine. It is to be assumed that Hewitt did not make it pay as such, otherwise he or some other person would have continued its development. The defendants were at great pains to show that the leasers lost money in shipping iron (Tr. 165). As an *iron* mine it is appropriately named. It is worthless as such, but the character of ore that Filcher discovered in his 10-foot discovery shaft, and that the defendant leasers discovered by stoping into it from below, shows that Filcher was justified in hoping to give it a new and better standing as a gold mine.

The rule referred to by the court that land should be classified according to the use for which it is most valuable (Tr. 84) does not aid the defendant herein, since in 1910 the land had proved to be valueless for iron. The discovery of gold on which the Never Pay was located gave it a distinct value as a prospective gold mine. Later Filcher found crystallized lead in the Glory Hole (Tr. 126). Cook assumes to himself the

credit for discovering the mineral values of the mine (Tr. 164). He is taking to himself credit that belongs to Filcher.

VIII.

ANNUAL LABOR ON INTERVENORS' CLAIMS.

The court holds the annual labor done by Filcher in wheeling out debris ("gob") from the Glory Hole as quite worthless for the purpose (Tr. 82)—"of no more validity as development work than annual drainage by pumping water out of a shaft."

The cases the court cites are not appropos. Hough v. Hunt holds the services as a watchman insufficient as annual labor. In the Evalina case, unwatering a mine to permit an inspection by a prospective buyer was held insufficient. A mine drained of water fills up again. The gob wheeled out of the Glory Hole could not get back. Filcher testified that his purpose in wheeling out this debris left by Hewitt's workmen, was to get to a tunnel started by the Loiselle boys (Tr. 176). This is the tunnel McDonald, geologist for defendant railway company, found on the southwest quarter of the Glory hole (Tr. 167) in 1918 or 1919, and probably also the tunnel that Cook drove "to see what was underground" (Tr. 164).

Before this tunnel could be driven the debris left by Hewitt's workmen and by crumbling walls had to be cleared out. Raiff testified that it was "full of rock" (Tr. 161) that required four months to haul out. This kind of work performed by defendants' lessees seemed

to have far more merit in the mind of the court than when performed by Filcher. Almost immediately after this debris was removed and the tunnel started, the lessees found the lead ore (Tr. 164) that Filcher had found in the bottom of the glory hole in 1915 (Tr. 176).

The court in its decision says: "Both Jones and Filcher refer to their development and disclosures of 'iron ore,' though both when driven and led assert they knew somewhat of the gold and silver traces or content" (Tr. 82).

The words "driven and led" constitute a slur unworthy of the learned trial judge and is entirely gratuitous and uncalled for. The value of the Filcher discovery was abundantly shown without the testimony of either Jones or Filcher and there is no indication of either being "driven" or "led." The fact that defendant lessees had undermined the Never Pay discovery vein from below should have caused the court to go slow in attributing anything other than good faith to either Filcher or Jones.

It might be well for the court to consider in this connection that the want of annual labor or the insufficiency of annual labor during any year does not constitute an abandonment of a claim.

> Madison v. Octave Oil Co., 154 Cal. 768, 773;
> Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. 337, 343.

IX.

The court also takes occasion in his decision to express his dissent from decisions of the Supreme Court in the cases of Diamond Coal Co. v. U. S. and U. S. v.

Ry. Co. (Tr. 84), and to indicate how these decisions work to the advantage of fraudulent stock schemes, etc.

An examination of these decisions will show that the court's criticisms are not justified. It will be a sorry day for the mining industry of the west when the mine claimant is compelled to show ore of commercial value in the outcrop of his vein. We fail to see, however, how the cases cited have any bearing on this case. The mineral character of this land was not a matter of mere belief after Filcher's discovery, but of *knowledge*.

X.

RELATIVE EQUITIES.

The defendant railway company is not entitled to any sympathy. Within less than four years after the issuance of the patent in controversy and when the development work on the Never Pay was in the condition in which Filcher's work had left it, we find the railway company giving a lease to Raiff which states positively, "The ore contains gold and silver which shall be paid for," etc. (Tr. 155).

Neither are the lessees entitled to sympathy. They took the lease, according to their testimony, for the sole purpose of mining iron ore (Tr. 161). Finding it unprofitable (Tr. 165), they were about to shut down (Tr. 162) when they found the other deposit of mineral that Filcher had already found, that outcropped in his discovery and that he had dug into in the Glory Hole (Tr. 176).

The equities are all with the intervenors. If there was a delay in instituting this action to cancel the pat-

ent, the intervenors were not responsible for it. But the defendants, stoping out rich gold ore, are not entitled to complain of this delay. It was not within the power of intervenors to have brought this action. All that they could do was to importune the United States government to bring it. This they did. Their diligence in this respect does not appear in the record nor is it material, although the trial court in its decision animadverts on the fact that, when the suit was brought, but two months remained of the statutory period within which it could have been brought (Tr. 76). Considering the deliberation with which the government acts in such matters, the intervenors should be congratulated on the quick time that was made. The active trespasses on the Never Pay were only about two years old when the suit was brought.

For the reasons stated in the foregoing brief, the judgment of the lower court should be reversed, and the court should be instructed to enter a decree cancelling the patent in controversy as to the ground conflicting with the Never Pay and Granite Spar Lode claims.

Respectfully submitted,

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